APPENDIX A

No. 73-1391

United States Court of Appeals for the Sixth Circuit

Fred Bramblett,
Plaintiff-Appellant,
v.
William R. Desobry, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed January 8, 1974

Before: McCree and Miller, Circuit Judges, and Krupansky,* District Judge.

Per Curiam. This is an appeal from summary judgment for defendants in an action by Fred Bramblett against William R. Desobry, Commanding General of Fort Knox, and Robert F. Froehlke, Secretary of the Army. The amended complaint alleged that General Desobry acted in an arbitrary, capricious, and unconstitutional manner in dismissing Bramblett on September 3, 1971 from his position as manager of the Fort Knox Rod and Gun Club, a nonappropriated fund activity. Bramblett sought reinstatement, injunctive relief, damages, and a declaratory judgment.

On January 19, 1973, appellees moved to dismiss the action and the court ordered the motion to be treated as one for summary judgment. On February 27, 1973, summary judgment

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* The Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, sitting by designation.

was granted for the appellees on the grounds that the court lacked subject matter jurisdiction because of sovereign immunity. Bramblett appeals from that order.

A nonappropriated fund activity is initially created by government loans which are repaid out of profits earned by the activity. Such activities "are arms of the Government deemed by it essential for the performance of governmental functions . . . and partake of whatever immunities it may have under the Constitution and federal statutes." **Standard Oil Co. v. Johnson,** 316 U.S. 481, 485 (1941). The Fort Knox Rod and Gun Club, a nonappropriated fund activity, is an instrumentality of the United States and is, accordingly, entitled to claim sovereign immunity in actions brought against it.

The mere fact that appellant named only individuals as defendants does not preclude the defense of sovereign immunity. "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or to compel it to act." **Dugan v. Rank,** 372 U.S. 609, 620 (1963); **Land v. Dollar,** 330 U.S. 731 (1947); **Larson v. Domestic and Foreign Corp.,** 337 U.S. 682 (1949). **See also Hawaii v. Gordon,** 373 U.S. 57 (1963).

Government officials are personally immune from damage suits so long as they are acting within the scope of their duty, despite the effects of their actions. **Spalding v. Vilas,** 161 U.S. 483 (1895). There is an absolute privilege regardless of whether the appellee's decision was made in an arbitrary and capricious manner as appellant alleges. In a case involving libel by a government officer, the United States Supreme Court held, "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite allegations of malice in the complaint." **Barr v. Mateo,** 360 U.S. 564, 575 (1959). Here, the

fact that General Desobry, as Commanding General of Fort Knox, had the power to fire appellant renders irrelevant the contentions that he abused his discretion and acted outside his authority. The general's exercise of his power to dismiss employees is immune from personal damage suits.

Appellant's contention that the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*) confers jurisdiction upon the United States District Courts to review an abuse of discretion is also unfounded. "The United States as sovereign is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." **U.S. v. Sherwood**, 312 U.S. 584, 586 (1941); **Hawaii v. Gordon,** *supra*. The APA does not confer jurisdiction on the courts. **Yahr v. Resor,** 339 F. Supp. 964 (D.N.C. 1972); **Ove Gustavsson Contracting Co. v. Floete,** 278 F.2d 912 (2d Cir. 1960). "In any case wherein the immunity doctrine is so transcending as to require dismissal of the suit, the Act (APA) does not provide for judicial review." **Washington v. Udall,** 417 F.2d 1310, 1320 (9th Cir. 1969); **Littel v. Morton,** 445 F.2d 1207 (4th Cir. 1971). We think this is such a case.

There has been no waiver of sovereign immunity for a nonappropriated fund activity such as the Fort Knox Rod and Gun Club. Although 28 U.S.C. § 1346(a), enacted as an amendment to the Tucker Act in 1970, expressly allows suits based on contracts with post exchanges, Congress deliberately withheld waiver of sovereign immunity for all other types of nonappropriated fund activities. **Swift-Train v. U.S.,** 443 F.2d 1140 (5th Cir. 1971). Sovereign immunity likewise barred a mandamus action against a nonappropriated fund activity in **Bowen v. Culotta,** 294 F. Supp. 183 (D. Va. 1968), where an employee sought reinstatement after being fired by her superior.

Appellant's suit is barred by the doctrine of sovereign immunity. The order of the district court granting appellees' motion for summary judgment is therefore affirmed.

APPENDIX B

United States District Court for the
Western District of Kentucky
At Louisville

Fred Bramblett, Plaintiff, vs. William R. Desobry and Robert F. Froehlke, Defendants.	Civil Action. No. 7333-A.

Memorandum Opinion

This case is before the Court on the Defendants' Motion to Dismiss, which, by Order of this Court on January 19, 1973, is being treated as a motion for summary judgment. The point at issue in this case has evolved from a demand for the production of certain information to a claim for damages and injunctive relief. It is the position of the Defendants that this Court lacks jurisdiction over the subject matter of this action, under the doctrine of sovereign immunity.

In May, 1971, the Defendant, Desobry, commanding general at Fort Knox, Kentucky, ordered the suspension of the Plaintiff from regular employment as manager of the Fort Knox Rod and Gun Club, a non-appropriated fund activity, on the grounds of inefficiency and mismanagement. Various investigations, a hearing before an examiner, and submission to a semi-secret board of review all took place before the final decision of the Plaintiff's removal was made in June, 1972. In the interim period, there was some controversy over the production

of certain documents by the Defendants, but that dispute is at rest now because all such documents and information have been made available to the Plaintiff. The Rod and Gun Club, as a non-appropriated fund activity, is an instrumentality of the United States. In making the decision to suspend and then to remove the Plaintiff, the Defendant, Desobry, was acting in his official capacity as commanding general of Fort Knox.

In his Complaint and Amended Complaint, the Plaintiff raises numerous questions of procedural due process, denial of right of appeal, and discrimination. He has claimed that the decision to remove him was made in an arbitrary and capricious fashion. However, the Court feels that, in view of the situation, the only issue which requires attention is whether or not this Court has jurisdiction to hear this case.

The Court believes that the doctrine of sovereign immunity precludes it from hearing this case for two reasons. First, it does not appear that the United States has ever consented to suits against it involving non-appropriated fund activities. Secondly, all of the actions taken by the Defendant, Desobry, regarding the Plaintiff were done within the scope of his official responsibilities.

It has long been well established that a non-appropriated fund activity is an instrumentality of the United States and entitled to all immunities thereof. **Standard Oil of California v. Johnson,** 316 U.S. 481. It is not herein contended that the Fort Knox Rod and Gun Club is other than a non-appropriated fund activity. The Court believes that the Plaintiff is in error in his belief that the Standard Oil case is limited to the specific factual situation therein involved. There is no indication to that effect in the opinion. The Supreme Court ruled that a non-appropriated fund activity shares in fulfilling the duties entrusted to it and partakes of whatever immunities it may have under the Constitution and federal statutes. See also **Swift-Train Co. v.**

United States, 443 F.2d 1140 (C.A. 5, 1971); **Bowen v. Culotta,** 294 F. Supp. 183 (E.D. Va., 1968).

As an instrumentality of the United States, a non-appropriated fund activity can be the subject of a lawsuit only when and if the United States consents. Simply stated, the Court does not find that the United States has ever given its consent to suits like the present one. 28 U.S.C. § 1346 comes closest of any statute to addressing this issue, and it gives consent to suits on contracts against post exchanges on military bases. There is no indication of an intention by Congress to extend consent to other non-appropriated fund activities. Indeed, the legislative history of 28 U.S.C. § 1346, as amended, indicates that only suits by independent contractors against post exchanges for services and materials were under consideration. Suits by employees for wages were never considered. The Court repeats that it has found no other statutory authority which gives consent to a suit like the present one. The Court does not believe that the consent of the sovereign to be sued can ever be implied. If such consent is not explicit, it does not exist. In the current case, it just does not exist. See **Hawaii v. Gordon,** 373 U.S. 57 (1963); **Jaeger v. United States,** 394 F.2d 944 (C.A. D.C., 1968); **Bowen v. Culotta,** *supra.*

Aside from the issue of the lack of the sovereign's consent to be sued, the doctrine of immunity would apply in this case anyway because the Defendant, Desobry, was acting within the scope of his official responsibilities as commander of Fort Knox when he ordered the removal of the Plaintiff. The Plaintiff does not contend that the Defendant, Desobry, was not the proper authority to make the decision to remove him; he only contends that an unfair and erroneous decision was made. The leading case on this topic is **Barr v. Matteo,** 360 U.S. 564 (1959), which, although it was a slander-libel case, set down the rule on the immunity of government officers from suit. The Supreme Court held:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties . . .

This rule has been extended to specifically include military officers sued in their official capacity within the shield of sovereign immunity. **Harris v. United States,** 204 F. Supp. 288 (D.C. Mass., 1962), **affirmed** 308 F.2d 573.

The Court notes that employees of non-appropriated fund activities are specifically exempted from the relevant provisions of the Administrative Procedure Act, 5 U.S.C. § 2105(c). The Plaintiff's reliance on that Act, therefore, is misplaced.

The Court further notes that Army Regulations 230-2, effective January 1, 1972 (and, therefore, too late to affect the Plaintiff herein), will to some degree, at least, provide appeals for persons in situations similar to the Plaintiff.

It is, of course, obvious that all that has been said above in relation to the Defendant, Desobry, applies as well to the Defendant, Froehlke, who, in any event, was not mentioned in the Plaintiff's allegations.

On the grounds that this Court lacks jurisdiction in this case because of the immunity of the sovereign, the Court has this day entered an Order granting the Defendants' Motion for Summary Judgment.

February 26, 1973.

/s/ Charles M. Allen
United States District Judge

Copies to:

Counsel of record.

(Entered Feb. 27, 1973)

APPENDIX C

Department of the Army
Headquarters US Army Armor Center and Fort Knox
Fort Knox, Kentucky 40121

AHBADPCA-CP 1 June 1972

Subject: Final Decision on Appeals from Suspension and Removal

Mr. Fred Bramblett
Route 6
Elizabethtown, Kentucky 42701

1. This is to notify you of the final decision in response to your letters dated 11 August 1971 and 15 September 1971, in which you requested a review and hearing under the appeal procedures of this Headquarters.

2. A careful study has been made of all records pertaining to the adverse personnel actions appealed, i.e., (a) your suspension from duty without pay from 30 July 1971 through 29 August 1971 from your position as Manager of the Fort Knox Rod and Gun Club, a nonappropriated fund activity, and (b) your removal from such employment effective 6 September 1971.

a. This study revealed that responsible and authorized officials complied with all procedural and regulatory requirements applicable to nonappropriate fund (NAF) employees in processing these personnel actions. The procedures followed were reasonable and provided ample opportunity for reply (including reply to the clarified and supplemental charges dated 16 August 1971) and for fair and equitable decisions. Your request for

adherence to various inapplicable Civil Service and Civilian Personnel regulations was properly denied; the cited regulations had not been adopted for application to NAF employees by higher headquarters and it was not feasible or reasonable to do so locally.

b. The reasons for the personnel actions were specificially described with detailed supporting information in the form of specific charges. Material relied upon to support the charges was also made available. Your contention that the reasons were vague is not substantiated by the record.

c. The administrative appeal and hearing procedures, established by this Headquarters as a local installation policy for all NAF employees on 5 February 1971, were followed to the fullest. The lengthy hearing insured that your point of view received full and objective consideration and that relevant facts and circumstances were developed to enable an equitable and responsive final decision.

d. The reasons for the suspension were cited in letters to you dated 28 July 1971 and 17 August 1971. The reasons are supported by substantiated evidence in the record and are found to warrant the suspension.

e. The reasons and specified charges which formed the basis for the removal decision were cited in letter to you dated 3 September 1971. The charges were amended by withdrawal during the hearing of stipulated portions of four charges, numbered in your summation as 4 (specified items of inventory), 10 (Part 4 regarding firearms license revocation), 10a (the first part regarding cash sales not rung up on the cash register), and 16 (the candy commission portion). With the exception of charge 12, all of the remaining charges are found to be supported by the evidence of record, and, in view of this I can only conclude that the removal action taken against you was justified.

(1) Your contentions that the penalty is excessive and that each of the charges be considered a first offense under Table 7-1 of AR 230-2 are inconsistent with the intended use of the table for individual offenses, the nature and number of charges, the responsibilities of the position, and the fact that the charges are supportive to the basic reasons of "continued inefficiency, violation of regulatory requirements whereby the safety of funds and property were endangered, and application of improper business practices." Each individual charge, standing alone, might not warrant, removal or suspension. Taken together, however, they provide reasonable cause to conclude that removal is warranted to promote the efficiency of the operation.

(2) Your references to continued Club practices and financial success after your removal are immaterial to the issues in question.

(3) Your references to the previous longevity salary increase and promotion by job reclassification do not mitigate the deserved severity of the appealed personnel actions. Had the facts been known at the time, the salary increase and promotion would not have been approved.

(4) There is no evidence that the appealed personnel actions were arbitrary, capricious, unreasonable, or an abuse of management discretion.

(5) The position responsibilities included independent accomplishment of managerial business affairs in a responsible and efficient manner, compliance with regulatory and procedural requirements, and the safe-guarding of property and funds. The sustained charges reflect a series of unacceptable failures to properly and adequately carry out these responsibilities. Your removal was therefore warranted to promote the efficiency of the NAF activity concerned.

3. In view of the voluminous record, I appointed an impartial board of officers to make a detailed independent review of the

hearing transcript and exhibits. The Board recommended that management's decisions be sustained.

4. For the above reasons, my decision is that the remedial action you request is denied and the suspension and removal are sustained. This decision is final and you are not entitled to further review of this matter within the Department of the Army.

/s/ William R. Desobry
Major General, USA
Commanding

CF:

Mr. Jon E. Rickert, Attorney at Law

APPENDIX D

8 March 1972

Subject: Report of Inquiry on the Appeal of Mr. Fred Bramblett, Fort Knox, Ketucky.

Part VI—Summary.

1. Testimony and evidence produced during the hearing indicates that at the time of the alleged charges there was not a well defined SOP; that instructions were fragmentary and allowed a wide latitude of interpretation and implementation at the Club Manager's discretion.

2. The notices of proposed action did not sufficiently identify what Mr. Bramblett was charged with (what, when, where, why and how) in the majority of the charges for the examiner to determine whether or not the evidence presented or the testimony given even pertained to the same offense he was supposedly being charged with.

3. Testimony and evidence presented indicated that the investigation may have been initiated by a statement made to the CID by an employee, Thomas Hansbrough (see page 50, Session Number 1, testimony of Major Campbell).

4. Testimony by two witnesses Bob Davidson (see page 7, tape number 2, Session Number 13) and Sergeant Haywood (Appellant's Exhibit Number 12) indicates that Mr. Hansbrough had threatened to "get even" with Mr. Bramblett.

5. Official records do not substantiate the charge of continued inefficiency inasmuch as there was no record of previous offenses in Mr. Bramblett's personnel file.

6. Mr. Kenneth A. Wietstock, Chief, CPO NAF Branch, testified that he personally informed Mr. Bramblett in the presence of Mr. Rickert, on or about 20 August 1971, that he felt the charges should be dropped for lack of evidence (see page number 10, Session Number 13).

Part VII—Findings and Recommendations.

1. As the record shows, the offenses committed by Mr. Bramblett were minor and no previous disciplinary action had been taken for alleged offenses dating back to 1969. Colonel Leo J. Nawn, Mr. Bramblett's immediate supervisor at the time disciplinary action was taken stated for the record (Appellant's Exhibit Number 9) that during his tenure of office (May 1970 to May 1971) Mr. Bramblett did an outstanding job as Manager of the club; financial records will reflect that the overall annual operations were successful; that he was loyal, faithful, trustworthy and courteous to all. Considering the appellant's case in the light of the foregoing, the examiner can only conclude that a removal action was unjustified in his case. This finding takes into consideration the examiner's belief that in view of all the circumstances surrounding the committed offenses, the penalty imposed will not improve the efficiency of the service.

2. Recommend that Mr. Fred Bramblett be restored to his position retroactive to the effective date of his removal, 6 September 1971, that the 30-day suspension prior to and connected with the removal be cancelled, and that he be fully remunerated for all loss of pay and allowances due to these actions.

/s/ Jonny M. Holloway
Appeals Examiner

5 Incl
as

APPENDIX E

Affidavit

1. I, William R. Desobry, being under oath, do hereby state that I am the Commander, U. S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, and that I have held this position since 1 April 1971.

2. The purpose of this affidavit is to clarify for the court certain of the actions taken by this headquarters concerning the removal of Mr. Fred Bramblett from his position as manager of the Fort Knox Rod and Gun Club.

3. First, I would like to explain clearly my personal activities concerning Mr. Bramblett's removal. All of the personnel actions concerning Mr. Bramblett, from the initial notification on 14 May 1971 of leave without pay to the decision on 3 September 1971 to remove him, were accomplished by the Nonappropriated Fund Branch, Personnel Services Division, Directorate of Personnel and Community Activities, the staff section having supervisory responsibility over the Rod and Gun Club's activities, with assistance from the Nonappropriated Fund Personnel Branch of the Civilian Personnel Office. Naturally, I was generally aware of the proceedings; I have a regulatory duty under paragraph 1-8a, Army Regulation 210-10 (Incl 1), and paragraph 1-4c, Army Regulation 230-2 (Incl 2), to be so informed. However, my interest in the case was purely informational until after the record of the case was forwarded to me for final decision upon Mr. Bramblett's appeal. Prior to receiving the record for final decision, I had neither formed a personal opinion concerning the case nor attempted to influence my subordinates in their actions concerning it.

4. a. In a normal case, before being forwarded to me for final decision, the appeal examiner's findings and the verbatim

record of the appeal hearing would have been evaluated by the members of my staff whose areas of expertise the removal action involved. This procedure would have been consistent with Army guidelines for staff procedure as outlined in paragraphs 1-7 and 2-3, Field Manual 101-5 (Incls 3 and 4). However, in this case, I felt that the record was too massive and complex to permit normal staffing without adversely affecting other essential missions of this command. Therefore, I ordered the appointment of a special board of officers to review the record and to make recommendations to me as to appropriate action in the case. The board was not intended to be, nor was it, an adversary investigative proceeding. Neither management nor Mr. Bramblett appeared before it. The board considered only the record as it already existed; no new evidence was added, no new witnesses were called. The authority for the board was cited in the appointing order as Army Regulation 15-6 (32 C.F.R. 519) only because that regulation serves as a general procedural guide for all boards of officers not appointed under a specific regulation. Since the board was in essence performing a staff review rather than an original investigation, it was my opinion that neither party to the removal proceedings required notification, representation, or any of the other procedural rights outlined in Army Regulation 15-6.

b. There was no effort made to conceal the existence of this board. Orders appointing the board were published and distributed in the normal manner. On the other hand, as I stated above, in light of the fact that the board was merely substituting for normal staff review, neither of the parties were notified or present at the board hearing. Also, after the board had completed its assigned task, its recommendations constituted an internal communication providing advice for my final decision. As such, under paragraph 10e(1), Army Regulation 345-20 [32 C.F.R. 518.10(e)(1)], they were not releasable to the public.

c. In reaching my final decision in this matter, I considered neither the appeal examiner's findings nor the 15-6 board's recommendations as binding upon me. After consideration of both of these, as well as further recommendations by my staff members, I personally made the final decision to uphold the removal of Mr. Bramblett.

5. The next matter for explanation is the actions taken by this headquarters on the requests by Mr. Bramblett's attorney, Mr. Rickert, for information pertaining to this case contained in files at this headquarters. The first two requests, on 3 April and 1 May 1972 (Exhibits A and C to the original complaint), were considered in the context of, and tied to, Mr. Rickert's contention after the appeal hearing that he had a right to further participation in the decision-making process in this case. Mr. Rickert's position appeared to be that he required this information because he was entitled to rebuttal if I, or a higher Army appellate body, determined that the appeal examiner's findings should be overruled. The opinion of this headquarters was that his interpretation was incorrect in that I was the final decision-maker and the appeal examiner's findings were not binding upon me. Therefore, the responses to Mr. Rickert's letters of 3 April and 1 May treated the requests for information as ancillary matters to the procedural objections he had raised rather than as formal requests for release under Army Regulation 345-20 and the Freedom of Information Act. In contrast, Mr. Rickert's letter of 27 June 1972 (Exhibit G to the original complaint) was unequivocally such a formal request and was treated as such. This letter was referred to my Staff Judge Advocate under paragraph 7a, Army Regulation 345-20, for a legal determination as to what information was releasable. His study of the problem, with a proposed reply for the Deputy Installation Commander's signature, was completed and forwarded on 20 July 1972, which was four days before Mr. Bramblett filed his original complaint and five days before this headquarters was served with that complaint. Due to normal processing of

this study through my subordinates, though, it did not reach me until 26 July, at which time, of course, I did have knowledge of the suit. However, as I normally would in a matter like this involving strictly a legal issue, I deferred, without exception, to the advice of my Staff Judge Advocate. Thus, the letter which the Deputy Installation Commander dispatched to Mr. Rickert on 26 July 1972 (Incl 5) had, in fact, been prepared without knowledge of Mr. Bramblett's original complaint.

6. Finally, all of my activities in this case were accomplished in my official capacity as Commander, U.S. Army Armor Center and Fort Knox.

/s/ William R. Desobry
Major General, U.S. Army
Commanding

Subscribed and sworn to before me, a person authorized under 10 U.S.C. 936 to administer oaths, this 22d day of November 1972 at Fort Knox, Kentucky.

/s/ James E. Macklin, Jr.
Colonel, JAGC
Staff Judge Advocate

APPENDIX F

The statutes which pertain to judicial review of administrative action in the district courts provide as follows:

28 U.S.C. § 1331. Federal question; amount in controversy; costs

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1361 Action to compel an officer of the United States to perform his duty

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. § 2201 Declaratory Judgments. Creation of remedy.

> "In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 Declaratory Judgments. Further relief.

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Rule 25(d) of the Federal Rules of Civil Procedure, pertaining to suits against public officers, provides as follows:

> "(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomes not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.
>
> (2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added."

Administrative Procedure Act—pertinent provisions show intent to make review available without bar of sovereign immunity:

5 U.S.C. § 701. Application; definitions

> "(a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

5 U.S.C. § 702. Right of review

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. § 703. Form and venue of proceeding

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

5 U.S.C. § 704. Actions reviewable

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . ."

5 U.S.C. § 706. Scope of review

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."